

maximize the efficiencies which can be achieved by using in-place cable facilities as part of a wireless network.⁹⁹

Nextel and Cox merely represent the two CMRS providers who have expressly targeted the California market and are farthest along the path to operational status. Without a doubt, many of the likely bidders for PCS spectrum in the upcoming auction to be held by the FCC will consider bidding for PCS licenses in California markets, where the demand for wireless services is known to be high. These potential entrants include highly sophisticated, technologically advanced companies, such as Pacific Bell¹⁰⁰; Time Warner Communications, Inc.; AT&T; and Viacom International.¹⁰¹

The Carriers Association strongly endorses the conclusion of Charles River Associates that scarcity rents are in large part responsible for the rates and returns which prevail in the California cellular markets. Report at p. 23-24. This being the case, any potential bidder for PCS spectrum would have to be attracted to a market where spectrum retains such

⁹⁹ See Common Carrier Week, July 4, 1994, No. 27, Vol I.

¹⁰⁰ Pacific Bell recently announced that it intends to operate as a cellular reseller in California. See Pacific Bell Re-Enters Mobile Market, *The San Diego Union-Tribune*, July 16, 1994, at C-1. This could easily be interpreted as the first step in a coordinated plan to launch a Pacific Bell PCS network by building a customer base in California in advance of bidding for or purchasing a PCS license.

¹⁰¹ "Broad Coalition Forms to Push for Rapid Introduction of PSC", Communications Daily, March 11, 1993, Vol. 13, No. 47; p. 3.

a high value. There can be little doubt that there will be intense competition for California PCS licenses and that successful bidders will be very active competitors of the licensed cellular carriers. Indeed, by the time the FCC renders its decision on the CPUC Petition, the broadband PCS auction may have taken place and the identity of the new PCS licensees in California may be known. This could allow the FCC to assess the level of potential competition more precisely.

In any event, the Commission must take into account the fact that CMRS providers are already constructing new networks and converting other networks in California to compete with the cellular carriers. These entities will soon be joined by other well-financed and aggressive competitors once additional PCS spectrum is allocated by the FCC's auction mechanism. Thus, in considering the merits of the CPUC Petition, the Commission must recognize that the California cellular market is entering a period of intense transition in which competition in all forms of wireless communications will dramatically increase. This presents an entirely different market picture than that framed by the CPUC, and warrants a regulatory policy considerably more enlightened than the one proposed by the California commission.

2. Customer Growth: A Measure of Investment in Capacity and Customer Satisfaction

The Commission's second criterion is the number of subscribers to cellular service and the trend in customer growth over the recent past. As discussed in the preceding section, the growth in the number of subscribers to California cellular systems has been extraordinary, far exceeding expectations. The individual California cellular carriers generally treat the number of subscribers as proprietary information. However, the Carriers Association has compiled aggregate subscriber growth information from its member carriers for the years 1990 through 1993. This information, presented in Chart A in Appendix B, documents the rapidly accelerating growth of the California cellular market. At the same time, the Carriers Association data undoubtedly understates overall California cellular subscription numbers because it is limited to data from cellular licensees owned or jointly owned by the eleven members of the Carriers Association. It is also certain that year end 1994 figures will show continued dramatic growth in customers.

This ongoing flood of new cellular customers in California proves several things. First, it renders nonsensical the CPUC's allegations that cellular carriers have not expanded the capacity of their networks in order to support higher cellular rates. Customer growth of the sort depicted in Chart A can only be accomplished in a state as geographically vast as California by massive infrastructure

investment. That massive investment has been made, as evidenced in Chart B which tracks overall investment in California by the Carriers Association's members from 1990 to 1993.

Second, the continued growth in cellular subscribers is the most basic evidence of customer satisfaction with cellular carriers' rates and service. Cellular service is not an indispensable requirement for most people, at least not yet, anyway. Basic utility services such as electricity, water, natural gas, and local exchange telephone service are clearly in a different category. Even the CPUC concurs with this conclusion. D.94-08-022 at 68. Yet the rapidly swelling numbers of cellular subscribers are eloquent testimony to the fact that a large and ever increasing number of businesses and individuals believe that cellular service is both valuable and acceptably priced for the service provided.

3. Trends in Cellular Rates: Prima Facie Evidence of A Competitive Cellular Market in California

The FCC's third analytical element is cellular rates, including both the absolute level of rates and rate trends.¹⁰² There is one consistent trend to cellular rates in California, a trend studiously ignored, evaded, or mischaracterized by the CPUC. Over the last four and one half years, cellular rates in California have decreased for all classes of customers at all levels of usage in all types of markets. California rates

¹⁰² Second Report and Order at ¶252.

are reasonable. The level of competition in the market, which is driving these sustained rate decreases, is completely capable of maintaining reasonable rates without continued state rate regulation. The Carriers Association has prepared an analysis of cellular rates which makes this conclusion self-evident.

The Carriers Association, in conjunction with the accounting firm of Ernst & Young, conducted a statewide study of cellular rates which covers the period from 1990 to mid-1994. All tariffed rate plans on file with the CPUC were analyzed.¹⁰³ The central premise of the study was that it is entirely misleading to concentrate on basic cellular rates, as the vast majority of customers not longer pay basic rates, having migrated to an array of discounted rate plans. This premise was confirmed by the data collected from the Carriers Association's member carriers. The percentage of cellular customers who have left the basic service plan for some variety of discounted plan has steadily increased over time. By mid-1994, it has become plain that the vast majority of

¹⁰³ The cellular markets in California were broken down into small, medium, and large markets which included under 200,000 customers, between 200,000 and 500,000 customers, and over 500,000 customers, respectively. See Attachment A to Appendix B setting forth the assumptions underlying the Ernst & Young study. Next customers were divided into groups of low, medium and high volume users of cellular service, with low volume users defined as those using 0-60 minutes of cellular service per month, medium volume users averaging 61 to 120 minutes of use per month, and high volume users averaging over 121 minutes of use per month.

customers are on discounted plans. Nearly 69% of the customers in large markets have shifted to discounted plans, over 77% of customers in medium markets have done the same, and in spite of lower overall rates, 34% of the customers in small markets are on discounted plans. See Charts G, H and I in Appendix B. Having established that most cellular customers do not pay the basic rate, the Carriers Association confronted the necessity for developing an analytical framework for tracking trends in discounted rates.

The adopted methodology involves analyzing the effective cost per minute rates for each rate plan of the two carriers in a given market. This calculation included monthly access rates, the number of minutes of usage included in the monthly access rate, and peak and off-peak rates, assuming customers generally divided their calls on a ratio of 80% peak and 20% off-peak. From these calculations, Ernst & Young determined the "optimal" rate plan or plans for the market in question. This represents the plan which a rational consumer would select in order to minimize his or her bill for the average volume of calls made per month--low, medium or high volume. The optimal plans were segregated by market size and were averaged on a straight line basis. The Carriers Association's study also represents "real" rate trends as the calculated rates were adjusted for inflation using a California specific.

Consumer Price Index for all urban consumers. Attachment A, Appendix B.¹⁰⁴

Percent Change in Retail Average Cost per Minute Adjusted by CPI-California Specific, 1990-94¹⁰⁵

	Low Usage	Medium Usage	High Usage
Large Market	-15.56%	-16.42%	-24.06%
Medium Market	-12.48%	-13.28%	-24.55%
Small Market	-21.52%	-20.77%	-23.06%

The results of the rate study reveal a significant real decline in the optimal discounted cellular rates for all classes of customers in large, medium and small markets over the 1990 to mid-1994 time frame. Combined with the proof that an overwhelming number of cellular customers take advantage of discounted rates, this data proves that customers are actually seeing less expensive rates each year. There can be no denying the overall trend. It is broadbased and consistent, over different size markets, over all volumes of usage, and over all of the years studied. It must be remembered, however, that those customers who can take advantage of such specialized plans, particularly promotional plans, can receive even greater discounts than those included in the Ernst &

¹⁰⁴ Ernst & Young specifically excluded from its analysis activation charges (which are frequently waived by most carriers), multi-line rate plans (which are not available to most individual cellular users), and seasonal, weekend, promotional, or limited area plans (again, these plans are characterized by limitations which make it difficult for the majority of customers to use them).

¹⁰⁵ Data presented is from Charts D, E, and F, Appendix B.

Young analysis, meaning that the effective decrease in rates is clearly understated.

In fact, Ernst & Young performed an exemplary calculation of one of the promotional rates which is typical of those offered in major California markets at this time. See Chart J, Appendix B. This chart indicates that depending on the call volume of the customer, he or she could expect to pay rates which are an additional 3% to almost 8% lower than the rates used in the Carriers Association rate study. This means that the actual decrease in cellular rates since 1990 experienced by those customers who do take advantage of promotional plans can be as much as 31 per cent. In essence, the findings of the Carriers Association rate study are very conservative, and reflect savings generally available to all cellular customers. The results of the study should be considered highly reliable by the Commission.

The CPUC, as explained in the Charles River report, has attempted to ignore the decreasing trend in rates by a number of stratagems. These include comparing only basic rates, ignoring the effect of inflation by using nominal rates, and asserting that various terms and conditions of discounted rate plans are too complicated to analyze.¹⁰⁶ However, such efforts are unavailing in the face of such consistent, decreasing trends in discounted rate plans. The CPUC is faced with trying to establish that the ever lower cellular rates in

¹⁰⁶ Petition at 34-36.

California are unreasonable, and that the clear downward trend in rates is unrelated to competition between cellular carriers. As indicated in the Charles River report, such a trend is entirely consistent with competitive behavior on the part of the carriers. Report at 12-13.

4. Cellular Service Is Not A Substitute For Landline Telephone Exchange Service

While cellular service is becoming more and more important as a communication tool in California and elsewhere, it has not become an "essential" service or a replacement for local telephone exchange service, and the majority of businesses and individuals continue to function by using alternative forms of communication. In its recent decision in I.93-12-007, which provided the legal and policy foundation upon which the CPUC has based its Petition to the FCC, the CPUC has conceded that cellular service, "is still not a basic service equivalent to landline telecommunications service at the present time." D.94-08-022 at 68. For purposes of this proceeding, the FCC should treat the CPUC Petition as being predicated solely on Section 332(c)(3)(B) of the Communications Act, that is, a petition which asserts rates are unjust or unreasonable and market conditions cannot correct these rates.

5. The Existing Barriers To Entry And Exit In The Cellular Industry Are Mandated By Statute

There are no absolute barriers to entry into the California cellular market other than those established by

Congress and those imposed by the FCC in the performance of the duties it has been assigned by Congress. Certainly, as discussed above in connection with the Charles River report's analysis of the CPUC's economic arguments, the federal spectrum allocation scheme cannot represent any justification for expanding or retaining state rate regulatory authority. The necessity for a consistent, nationwide procedure for allocating the scarce and precious radio spectrum amongst competing entities with multiple categories of usage is self-evident. One can argue, as the CPUC frequently has,¹⁰⁷ that another allocation policy might produce a different result, but that is another issue for another proceeding. Both the CPUC and existing and prospective CMRS providers in California must accept the FCC's policy for the assignment of spectrum to wireless communications.

Given the existing federal policy for spectrum allocation, there is nothing to support the CPUC's contention that it should be granted extended or additional rate regulatory authority. The federal spectrum allocation policy has been adopted,¹⁰⁸ the number and size of the spectrum bandwidths to be auctioned has been determined¹⁰⁹ and the FCC

¹⁰⁷ Petition at 25-26.

¹⁰⁸ Communications Act §6002; See Also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Dkt.No. 93-253, Fifth Report and Order (July 15, 1994), *mimeo.* at ¶¶ 6, 218.

¹⁰⁹ See Second Report and Order in the Matter of Amendment of the Commission's Rules to Establish New Personal

is moving steadily toward the auction of PCS spectrum to as many as six new CMRS providers.¹¹⁰ Combined with the presence of at least one ESMR provider, Nextel, who has announced the commencement of commercial operations in California,¹¹¹ the federal system will result in a dramatic increase in the level of competition in the California cellular market. As discussed in connection with the CPUC's economic analysis, the introduction of these competitors would produce enormous reductions in the market concentration calculations for such a market structure.

The CPUC's burden of proof requires that it demonstrate that there is insufficient competition in a market to sustain reasonable rates. The specific statutory and regulatory barriers to the entry into the CMRS market do not preclude additional competition, and indeed federal policy is encouraging substantial additional competition. Given the vastly reduced market concentration such a structure would entail and the vast new array of CMRS options for customers, it would appear impossible for the CPUC to demonstrate that such a market is incapable of producing reasonable rates. It is very important to recall the timing of the CPUC's Petition.

Communication Services, GN Docket No. 90-314, FCC 93-451 (adopted September 23, 1993).

¹¹⁰ See Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Dkt.No. 93-253, Fifth Report and Order (July 15, 1994), *mimeo.* at ¶¶ 6, 218.

¹¹¹ See Business Wire, July 8, 1994-Nextel Communications.

By the time the statutory period has elapsed for FCC action on the CPUC Petition, the PCS auction is likely to have occurred and substantial new competition may be deploying new networks in California. The CPUC Petition should not be judged on the basis of the market entry barriers that have existed to date because those barriers are falling even as the FCC commences its deliberations.

6. Allegations of discriminatory or anticompetitive actions

The CPUC has not alleged specific instances of discriminatory or anticompetitive actions on the part of the California cellular carriers. Nor has the CPUC submitted the necessary affidavits of individuals with specific knowledge of such actions.¹¹² Indeed, the only reference in the Petition to such practices is in connection with the CPUC's very general assertions that rates are too high and carriers' returns are too great. The Carriers Association has addressed at length the errors in the CPUC's analysis of rates and returns. To the extent the Commission concludes that California cellular rates are not unreasonable, and that the market is sufficiently competitive to forego state rate regulation, there is no need to comment further on these issues, as the CPUC has not relied upon these criteria as support for its Petition.

7. Evidence of systematic unreasonable or unjust rates

¹¹² Second Report and Order at ¶252.

The Carriers Association, in conjunction with Charles River Associates, has addressed the allegation by the CPUC that cellular rates in California are systematically unreasonable. See discussion in Section II.A., supra. On the contrary, cellular rates are declining steadily as a direct result of competition between cellular carriers. In addition, the level of competition in the California market is on the verge of increasing dramatically. Both of these circumstances effectively refute the notion of any "systematic" flaw in the California cellular market which would support rates above a reasonable level.

In addition, as discussed in the Charles River report, the CPUC's attempt to justify its argument in this regard by comparing cellular rates and costs is completely ineffective as a result of its improper confusion of nominal rates, real or inflation adjusted costs, and investment for future demand compared to current subscriber data. See discussion at 33-34, supra. The FCC must seriously confront the fact that to agree with the CPUC's assertions on the "unreasonableness" of California cellular rates is to deny a very clear downward trend in real rates, a trend which is benefitting cellular customers and stimulating even greater competition between existing and potential CMRS providers. The CPUC has failed to establish the existence of any systematically unreasonable rates.

8. Customer Satisfaction

The Carriers Association believes that the strongest evidence of customer satisfaction with the rates and service of California cellular carriers is contained in Charts A, G, H, and I of Appendix B, which demonstrate the dramatic growth in cellular subscribers and the even more accelerated increase in the number of customers taking advantage of discounted rate plans. As indicated in connection with the issue of wireless as a substitute for landline exchange telephone service, cellular service is conceded to be an optional communications service, not a necessity. The sheer number of customers "voting with their feet", not to mention their wallets, is persuasive evidence that they do not agree with the CPUC that cellular service is unreasonably priced.

III. THE CPUC'S PROPOSED REGULATION OF CELLULAR RATES WILL FRUSTRATE THE IMPLEMENTATION OF FEDERAL POLICY FOR THE WIRELESS TELECOMMUNICATIONS INDUSTRY

A. Federal Policy Regarding Wireless Communications Is Predicated On Similar Regulation For Similar Services And On Facilitating Rapid Development of Additional Wireless Services and Technologies

1. Regulatory Symmetry For Providers of Wireless Communications

Both the Congress and this Commission are driven by the twin goals of establishing regulatory symmetry for providers of similar wireless communications services of promoting and facilitating rapid deployment of additional wireless communications services. These policies are means to provide

consumers with a wide range of wireless communications services from which to choose and to enable all providers of such services to compete with one another without competitive disadvantages born of differing regulatory treatment. The CPUC's proposal to continue and to expand its regulation of cellular services in California would conflict with the achievement of these federal objectives.

In the Budget Act of 1993, Congress created two categories of mobile communication services -- (1) commercial mobile radio service ("CMRS") and (2) private mobile radio service ("PMRS"). Providers of CMRS are to be treated as common carriers under the Communications Act, while PMRS providers are not. Because "the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services," the fundamental objective of Congress' creation of these new classifications was to ensure that "similar services are accorded similar regulatory treatment." H.R. Conf. Rep. 103-213, 103rd Cong., 1st Sess. 494, *reprinted in* 1993 U.S. Code Cong. & Admin. News 1088, 1183 ("Conference Report"). In pursuit of this goal, Congress expressed a desire that regulation should "enhance competition and advance a seamless national network" of mobile radio services and should "foster the growth and development of [such] services[, which], by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 111, 103d

Cong., 1st Sess. 260-261 (1993) reprinted in 1993 U.S. Code Cong. & Admin. News 378, 587, 588. ("House Report").

The Commission began implementation of the Budget Act of 1993 on March 7, 1994 with its Second Report and Order in GN Docket No.93-252.¹¹³ At the outset, the Commission stressed its desire "to implement the congressional intent of creating regulatory symmetry among similar mobile services." Second Report and Order at 3. The Commission noted that, "although commenters may disagree about the extent to which specific mobile services are similar, they almost unanimously agree that Congress intended these provisions of the Budget Act of 1993 to create a system of regulatory symmetry." Second Report and Order at 8 n.29. Paragraph 15 of the Second Report and Order crystallizes the Commission's intentions:

We believe the actions we take in this Order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy. Moreover, in striving to adopt an appropriate level of regulation for CMRS providers, we establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees who are classified as CMRS providers by this Order.

Second Report and Order at 8 (emphasis added). With this objective in mind, the Commission determined that it should forebear from imposing tariff requirements on CMRS providers and should refrain from invoking with respect to such services

¹¹³ Implementation of Sections 3(n) and 332 of the Communications Act, GN Dkt. No. 93-252 (March 7, 1994) (Second Report and Order).

its authority under other provisions of the Communications Act. Id.

The Commission further stated that it will "vigorously implement[] the preemption provisions of the Budget Act of 1993 to ensure that state regulation of CMRS providers will be established only in the case of demonstrated market conditions in which competitive forces are not adequately protecting the interests of CMRS subscribers." Second Report and Order at 9. The Commission went on to state its belief that preemption of state regulation of CMRS providers is a critical element of Congress' efforts to achieve regulatory symmetry and to reduce regulatory obstacles to development of the wireless industry:

We believe that Congress, by adopting Section 332(c)(3)(A) of the Act, intended generally to preempt state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest.

Second Report and Order at 94. The Commission's approach conforms with Congress' intentions:

It is the intent of the Conferees that the Commission, in considering the scope, duration or limitation of any State regulation shall ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission so that, consistent with the public interest, similar services are accorded similar regulatory treatment.

Conference Report at 494.

The Commission pointed out that it has authority, even in the absence of the Budget Act of 1993's amendments to §332(c), to preempt state regulations "when interstate and intrastate

services are inseparable and state regulations would thwart or impede federal policies." Second Report and Order at 4 n.11 (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) ("Louisiana PSC"), and other authorities). The Commission explained, however, that the standards for preemption established in Louisiana PSC do not apply to rate and entry regulation of CMRS providers. Instead, Congress specifically has preempted such regulation through the Budget Act of 1993's amendments to Section 332(c). Nevertheless, the Commission may exercise its more general authority under § 2 of the Communications Act, 47 U.S.C. §152(A), to preempt state regulation of other terms and conditions of mobile wireless services "if we determine that a State's regulation of other terms and conditions of jurisdictionally mixed services thwarts or impedes our federal policy of creating regulatory symmetry...." Second Report and Order at 96 n.517.

2. Rapid Deployment of New Technologies Through the Allocation of Additional Spectrum

In addition to revising Section 332, the Budget Act of 1993 amended Section 309(j) of the Communications Act to authorize the Commission to conduct auctions to allocate additional radio spectrum for wireless communications services. Budget Act of 1993, §6002. Among the principal objectives of the amendments to §309(j) are

[to] promote the development and rapid deployment of new [wireless telecommunications] technologies; [and to] promote economic opportunity and competition and ensure that new and innovative technologies are available to the American people

Conference Report at 482.

Congress accordingly directed the Commission to quickly establish procedures for competitive bidding for new licenses to utilize additional portions of the radio spectrum for wireless communications services. The Commission has announced that it will undertake competitive bidding for thousands of licenses for broadband and narrowband personal communications services (PCS), for common carrier radio services, for Enhanced Specialized Mobile Radio services and for Interactive Video Data Services.¹¹⁴ In establishing its rules for such auctions, the Commission has explained how its regulations implement Congress' objectives:

Awarding licenses to those who value them most highly, while maintaining safeguards against anticompetitive concentration, will likely encourage growth and competition for wireless services and result in the rapid deployment of new technologies and services.

By establishing an efficient licensing mechanism that will promote the rapid deployment of a wide range of new products and services in all areas of the country, we seek to increase residential consumer and larger user access to new technologies and services. Efficient provision of wireless service may also create alternatives for those not served by traditional wireline providers and should create competition for existing wireline and wireless services.

Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Dkt.No. 93-253, Second Report and Order (April 20, 1994), *mimeo.* at 5-6 [¶ 5,7].

¹¹⁴ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Dkt.No. 93-253, Notice of Proposed Rulemaking (Oct. 12, 1993).

The fundamental premise of federal policy regarding wireless telecommunications is that enabling a large number of competing providers to offer an array of essentially interchangeable services to the public will provide American consumers at the earliest possible date with the most advanced wireless communications technologies at the most reasonable prices.¹¹⁵ Congress has recognized that a key factor in making this vision a reality is uniformity of regulation among all types of providers of mobile wireless services.

The CPUC's Petition to retain and expand its regulation of California's cellular carriers is an obstacle to achievement of the federal objective. Accordingly, the Commission must scrutinize the CPUC's request with the utmost care. CCAC is confident that such scrutiny will lead, for the reasons explained below, to the conclusion that the CPUC's Petition is inconsistent with federal policy and with applicable statutory standards and, therefore, must be denied.

B. CPUC Regulation of Cellular Carriers, and Wireless Communications in General, Is Incompatible With Federal Policy, And Continued Or Expanded CPUC Regulation of Cellular Rates Will Frustrate Federal Policy Objectives

The development of the California cellular industry has been significantly hampered by CPUC regulatory policy. The Carriers Association strongly believes that extending CPUC

¹¹⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Dkt.No. 93-253, Fifth Report and Order (July 15, 1994), *mimeo.* at ¶¶ 6, 218.

rate regulatory authority will further delay and distort the development of a fully competitive CMRS market in California. The positive results to date in terms of cellular customer growth do not make a case for continued CPUC regulation; indeed, they argue strongly against it.

The CPUC's existing tariff requirements for filing cellular rates have stifled competition over an extended period of time. Not only are carriers required to give competitors advance notice of their competitive rate offerings, but many rate filings were delayed by protests from competitors who used the CPUC regulatory process to slow down the introduction of new, lower cost rate filings. This mechanism has also been used by Nextel, which routinely protests carrier tariff filings in the Los Angeles area which it views as a competitive threat. In addition, Nextel has intervened in CPUC proceedings to deny cellular carriers the right to bundle cellular equipment and service, although Nextel will be able to engage in exactly the same marketing practice itself. Nextel has also sought to use state regulatory proceedings to obtain confidential and proprietary information about the wholesale invoice cost to the carriers of the cellular phones they sell.¹¹⁶

In effect, the CPUC regulatory process has invited abuse by competitors and has made carriers reluctant to incur the

¹¹⁶ I.88-11-040, Reporter's Transcript, May 17, 1994, Vol. 13 at 1724-1725. See Appendix D.

regulatory and legal expense of creating and filing new rate plans. This is not the vision of an open and competitive market place that the Carriers Association envisions for CMRS providers. Moreover, the FCC must recall that if the CPUC is granted the rate regulatory authority it seeks, this restrictive environment will be inhabited only by cellular carriers. Nextel and the other new entrants in the market who obtain PCS spectrum assignments will not be subject to the CPUC's regulations. This will result in a highly discriminatory regulatory environment. The Commission should not encourage such a result by granting the CPUC petition.

The CPUC has experimented with limited relaxation of the tariff filing requirements in two decisions which permitted rate increases and decreases within pre-set rate bands and which liberalized somewhat the rules for filing temporary and provisional tariffs. D.93-04-058, D.94-04-043. Yet these decisions leave in place many restrictions which inhibit the development of a fully competitive market. For example, D.94-04-043 permitted carriers to discount the cost of cellular service, but left in place a \$25 maximum limit on discounts for "tangible gifts" which, most inappropriately, has been interpreted to preclude granting discounts on cellular equipment as part of a rate plan.

In addition, the CPUC maintains a prohibition on the bundling of cellular services and telephone equipment.¹¹⁷ California stands alone among the 50 states in maintaining such a prohibition, which denies consumers the many benefits of bundling. Cellular carriers contend that the elimination of the bundling prohibition will result in a lower overall cost of owning and operating cellular phones, increase competition, bring California into line with her forty-nine sister states and the FCC, all of whom have concluded that the benefits of bundling far outweigh any risk of anti-competitive effects.¹¹⁸ Hearings have been held in the proceeding, but the CPUC has not issued a decision to date.

Many of the restrictive regulatory policies of the CPUC described above, including the bundling prohibition, the mandatory margin requirements, and restrictions on tariff filings, directly reflect the CPUC's long standing infatuation with the notion that resellers can provide retail competition which a duopoly market structure cannot. This is not the case, and the CPUC's persistent efforts to restrict the marketing flexibility of carriers while offering advantages to resellers has now, with the advent of the CPUC's order

¹¹⁷ See Petition by Bakersfield Cellular Telephone Company for modification of D.89-07-019 and Ordering Paragraph No. 16 of D.90-06-025, I.88-11-040. The Petition has gone to hearing, and is submitted for decision.

¹¹⁸ See Report and Order, Docket No. 91-347, 7 FCC Rcd No. 13, FCC 92 92-207 (1992).

requiring interconnection of reseller switches, progressed to the point of absurdity.

There is substantial evidence that the resellers are not, and will never be, a major competitive factor in the resale market. Indeed, the CPUC itself concluded that, resellers have been ineffective in enhancing competition in the cellular market.¹¹⁹ This opinion is shared by the Bureau of Economics of the Federal Trade Commission, which offered the following comments in the FCC's own proceeding on bundling:

In contrast [to the intraLATA market], no similar source of wholesale competition to the facilities-based cellular licensees exists, so the cellular reseller cannot serve the same procompetitive function as the intraLATA reseller.

* * *

Furthermore, given the competitive state of the retail cellular market, it is unclear what marginal contribution resellers make in the retail market. Resellers currently compete with a large number and variety of retail outlets in a competitive retail market, and it seems unlikely that their absence would result in a reduction in competition at the retail level.¹²⁰

For the CPUC to now require carriers to endure the expense and effort involved to interconnect reseller switches for what may be a period of no more than 18 months¹²¹, is to

¹¹⁹ I.93-12-007, p. 15.

¹²⁰ Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, filed July 31, 1991, In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, p. 13.

¹²¹ It should be noted that resellers will be operating their switches, if at all, for considerably less time than 18

pay undue homage to the myth of reseller competition. An effort of such limited duration simply cannot be expected to have any lasting impact on the competitive balance of the retail cellular market.

It is also extremely frustrating for carriers to be faced with lengthy regulatory litigation and delays when they seek additional flexibility in offering attractive rate plans to consumers as a result of the opposition of resellers. The CPUC's maintenance of a mandatory margin requirement provides resellers with an easy justification for protesting carriers' rate proposals. The end result, however, is delay in bringing new rates and services to customers. As the CPUC's own consumer advocacy staff has stated, "[T]his margin requirement only serves to protect the business opportunities of independent resellers...."¹²²

As all of the foregoing demonstrates, CPUC regulation is extremely costly and burdensome. The sheer regulatory expense involved in conducting a cellular business in California has reached staggering levels. These costs directly inhibit additional rate reductions for cellular subscribers by significantly increasing the cost of doing business in California. Cellular carriers have been forced to bear the cost of participation in Phase I, Phase, II, Phase III, the

months given the substantial amount of time required to design, construct and activate such a switch.

¹²² The Division of Ratepayer Advocates' Comments, filed February 15, 1994 in CPUC I.93-12-007, p. 25.